SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statute (Constitution) Involved	2
Question Presented	3
Statement of the Case	3
Argument	6
I	
The Court Below Gave Full Consideration to the Issue Herein Presented and Decided It Correctly	6
II	
Assuming Arguendo the Court Below Erred in Its Affirmance of the Judgment, Such Error (Under California Law) Fails to Present a Substantial Federal Question	6
III	
Petitioner First Unequivocally Raised a Federal Question in This Court; in Any Event, His Belated Attempt to Raise a Federal Question Is Insufficient to Vest Jurisdiction in This Court..	7
IV	
The Due Process Clause of the Fourteenth Amendment Does Not Require State Civil Jury Trials, and A Fortiori It Cannot Be Unconstitutional Thereunder to Limit a State Civil Jury's Function as Petitioner Here Suggests Was Done	11
Conclusion	12

INDEX TO APPENDICES

Appendix AA — Page

Topical Index and Index to Appendices, Appellant's [Petitioner's] Opening Brief, filed in California Court of Appeal, Second Appellate District 1

Appendix BB

Topical Index, Appellant's [Petitioner's] Reply Brief, filed in California Court of Appeal, Second Appellate District 12

Appendix CC

Topical Index and Index to Appendices, Appellant's [Petitioner's] Petition for Rehearing, filed in California Court of Appeal, Second Appellate District 14

TABLE OF AUTHORITIES CITED

Cases	Page
Callender v. Florida (1965), 380 U.S. 519, (1966), 383 U.S. 270	2
Corone Credit Corp. v. West Thrift Co. (1966), 244 Cal.App.2d 631, 53 Cal.Rptr. 433	9
Jessup, In re (1889), 81 Cal. 408, 471, 21 Pac. 976, 22 Pac. 742, 1028	4
McKeiver v. Pennsylvania (1971), 403 U.S. 528	12
Moore v. Illinois (1972), 408 U.S. 786, *reh. denied* 409 U.S. 897	11
Palmer Oil Corp. v. Amerada Petroleum Corp. (1952), 343 U.S. 390	7
Panotex Pipe Line Co. v. Phillips Petroleum Co. (5th Cir.), 457 F.2d 1279, *cert. denied* (1972), 409 U.S. 845	12
Puget Sound Power & Light Co. v. King County (1924), 264 U.S. 22	11
Smith v. Crocker First National Bank (1957), 152 Cal.App.2d 832, 837; 314 P.2d 237	9
Zucht v. King (1922), 260 U.S. 174	7

Rules	
Federal Rules of Civil Procedure, Rule 50	12

Statutes and Constitutional Provisions	
California Constitution, Art. I, Sec. 13	10
California Constitution, Art. VI, Sec. 10	2, 3, 10
United States Code, Title 28, Sec. 1257	2
United States Code, Title 28, Sec. 1257(2)	1
United States Code, Title 28, Sec. 1257(3)	1, 7
United States Constitution, Sixth Amendment	12
United States Constitution, Fourteenth Amendment	3, 11

Texts Page

Stern & Gressman, Supreme Court Practice (4th ed. 1969) 2, 8, 9, 10, 11

6 Witkin, California Procedure (2d ed. 1971), Appeal 9

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1428

GARY BROTT, a Minor, by his Guardian *ad litem*,
Petitioner,

vs.

ST. FRANCIS HOSPITAL OF LYNWOOD, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District (Erroneously Denominated "To the Supreme Court of California" in the Petition).

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion below is set forth in Appendix A of the petition for writ of certiorari (hereinafter the "petition"). The opinion below is not reported.

Jurisdiction.

Petitioner purportedly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(2). In fact, the petition for writ of certiorari is properly before this Court, if at all, pursuant to 28 U.S.C. Section 1257(3):

"§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

* * *

(3) *By writ of certiorari,* where the validity of a treaty or statute of the United States is drawn in question *or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,* treaties or laws *of the United States.* . . .

As amended July 29, 1970, Pub.L. 91-358, Title I, § 172(a)(1), 84 Stat. 590." 28 U.S.C. § 1257 (emphasis added).

(Petitioner erroneously denominated his petition "To the Supreme Court of the State of California." As the petition itself indicates, the decision herein challenged was rendered by the California Court of Appeal, Second Appellate District, on January 8, 1975. After that court denied rehearing on January 30, 1975, petitioner's petition for a hearing was filed in the California Supreme Court on February 14, 1975, and was denied without opinion on March 8, 1975. Because discretionary review in the California Supreme Court was declined, review should properly have been sought of the California Court of Appeal opinion, and the writ sought should have been directed to that court. *See Callender v. Florida* (1965), 380 U.S. 519, (1966), 383 U.S. 270; Stern & Gressman, *Supreme Court Practice* (4th ed. 1969), § 6.31 at 291.

Statute (Constitution) Involved.

Petitioner challenges the constitutionality, as applied, of California Constitution Article VI, Section 10, which provides in pertinent part:

"The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

Cal. Const. Art. VI, § 10.

Question Presented.

Did a jury instruction given by the trial court, commenting on certain evidence and argument of counsel under authority of California Constitution Article VI, Section 10, deprive petitioner of due process of law under the fourteenth amendment by allegedly "usurping" the jury's function and allegedly withdrawing certain issues from its consideration?

Statement of the Case.

Gary Brott has petitioned for a writ of certiorari to the decision (without dissent) of the California Court of Appeal, Second Appellate District, Division Two, affirming in all respects a judgment entered in the Superior Court of the State of California for the County of Los Angeles after a unanimous jury verdict in favor of defendant St. Francis Hospital of Lynwood and against plaintiff. The court of appeal denied rehearing on January 30, 1975, and the Supreme Court of California denied a petition for hearing on March 8, 1975.

This action by the minor petitioner, by his guardian *ad litem*, alleged injuries sustained at birth which resulted in his mental and physical retardation allegedly caused by the negligence of respondent's nursing personnel who attended Mrs. Dora Brott, petitioner's mother, in her labor in connection with the birth of

petitioner. The facts are more fully stated by the court of appeal in its opinion, at pages 2-4.[1]

Of the numerous contentions advanced in the appellate courts by petitioner in proceedings which have led to this last petition, only one is asserted herein. Petitioner contends that one of the trial court's instructions to the jury (quoted in the petition at pp. 3-6) contradicted portions of petitioner's counsel's closing argument to the jury and thereby "usurped" the function of the jury and as such constituted a denial of due process.

The trial court's instruction, challenged herein as a "usurpation" of the jury's role and as a "denial of due process," was carefully limited to one aspect of petitioner's closing and rebuttal arguments, and the court twice emphasized that such limited comments on the evidence were advisory only and not binding on the jury should it disagree with the court's views. The court's comments were limited solely to charges made by petitioner's

[1]Although respondent agrees substantially with the facts as stated in the court of appeal opinion, at least one reference is without support in the record and clearly erroneous. The gratuitous dictum contained on page 11 of the opinion that "The jury herein might have decided that defense witnesses were being coached by defense counsel; some of their testimony did change somewhat after lunch breaks and other conferences" is wholly inaccurate. The court added: "However there was no reason that the jury would have to find chicanery; rather, they might well have realized that several years had passed since Gary's birth and the trial, resulting in hazy memories and some internal inconsistencies in testimony." *(Id.)* Respondent did not petition for rehearing with respect to such reference in the court of appeal because the opinion and decision of that court fully resolved that matter favorably to respondent. *Cf. In re Jessup* (1889), 81 Cal. 408, 471, 21 Pac. 976, 22 Pac. 742, 1028 (suggesting that only error of fact or law which has done an injustice in a particular case or makes a precedent seriously doubted provides basis for petition for rehearing). Such inaction on the part of respondent should not, however, be interpreted as agreement with or acquiescence to the court of appeal's unfortunate and erroneous characterization of the record.

counsel that respondent's counsel had concealed evidence and caused certain witnesses to testify in an untruthful manner. The court observed that, in its opinion, neither charge was warranted by the evidence. The court did not remove any issue from consideration of the jury, but rather sought to have the jury direct its attention to the facts and issues of the case. The trial court observed, at the time of the hearing on petitioner's motion for new trial, as follows:

> "Now, I believe what I said in those comments; I believe that the comments were proper, but the purpose of the comments—by the way, you will recall, Mr. Pollack [counsel for petitioner], I did not stop you from arguing your view of what the evidence showed, despite Mr. Sharer's [counsel for respondent] requests and motions that I do so, because I thought you were entitled to argue that certain evidence was untrue; certain evidence given in this courtroom was false, and I suppose any lawyer is entitled to argue, but I cannot express strongly enough—well, perhaps, I can, because I did in my comments—that I just don't believe in it, and I thought that that was a false issue brought before the jury. I thought that the jury should decide this case on the merits; the evidence that they heard; decide whether the defendant hospital was negligent or not and it was with that in mind that I made the comments I did.
>
> I didn't do it with some misplaced affection for Mr. Sharer's firm, as you apparently believe from your moving papers; I did it so that the parties in this case could get a jury determination on the merits."
>
> Reporter's Transcript at 2609.

ARGUMENT.

I

The Court Below Gave Full Consideration to the Issue Herein Presented and Decided It Correctly.

Although petitioner has only recently cast his present contention in constitutional form (see Section III, *infra*), full consideration was given in the court below to the issue raised herein, and that court correctly determined that the instruction given was proper under California law. (*See* Appendix to Petition at 5-10.) Petitioner is unable to point to any contrary California authority.

Petitioner's reliance upon reversals in other California cases for erroneous or improper judicial comments is totally misplaced. (Petition at 8-9.) Petitioner begs the question when he suggests that "In every case in which the trial court made an improper comment upon the evidence, appeals courts have reversed." (Petition at 8.) Petitioner has not demonstrated that the subject instruction was improper, and a reading of the instruction itself belies such a contention. (Of course, should this Court choose to review this essentially factual question, respondent will establish by meticulous review of the trial record in this case (in excess of 2600 pages), that the court's instruction was amply supported and justified by the evidence.)

II

Assuming Arguendo the Court Below Erred in Its Affirmance of the Judgment, Such Error (Under California Law) Fails to Present a Substantial Federal Question.

In order for this Court to have jurisdiction to grant the petition for writ of certiorari, a substantial federal

question must be present. 28 U.S.C. § 1257(3), quoted above; *Palmer Oil Corp. v. Amerada Petroleum Corp.* (1952), 343 U.S. 390; *Zucht v. King* (1922), 260 U.S. 174. Mere error under state law, even concerning interpretation and application of a state constitutional provision, fails to raise a substantial federal question. (Respondent does not suggest, of course, that any error occurred, but only that such error as petitioner posits would be insufficient to vest jurisdiction in this Court.) The court below clearly held that the challenged instruction was proper under state law. No portion of the opinion discusses federal law, not a single federal case is cited, and it is apparent that no consideration was given to the propriety of the instruction under federal constitutional law.

III

Petitioner First Unequivocally Raised a Federal Question in This Court; in Any Event, His Belated Attempt to Raise a Federal Question Is Insufficient to Vest Jurisdiction in This Court.

Petitioner herein contends that the trial court's instruction, commenting on certain evidence, denied petitioner due process of law. Such contention is first made in this Court. Oblique reference thereto may have been made in the California Court of Appeal on two occasions. In his opening brief at the conclusion of the section entitled "The Issues Involved in This Appeal. Why the Judgment Should Be Reversed" petitioner states that "As a result of the foregoing, plaintiff was denied a fair trial to which he was entitled under our State and Federal Constitutions and Bill of Rights." Again, in the petition for rehearing in the same court,

a portion of petitioner's argument is entitled "STATEMENTS BEFORE AND FOLLOWING THE CHALLENGED INSTRUCTION THAT JURORS WERE THE SOLE JUDGES OF THE CREDIBILITY OF WITNESSES AND THE WEIGHT OF EVIDENCE DID NOT CURE THE PARTISAN STATEMENTS WHICH WERE PREJUDICIAL AND NECESSARILY RESULTED IN A DENIAL OF DUE PROCESS." These are the only references in the court of appeal to any question of constitutionality.

In neither of these briefs is a single federal case cited by petitioner, nor is a specific portion of the Constitution of the United States ever mentioned. It is clear that petitioner simply ignored any possible federal question until after denial of the petition for rehearing in the court below. (For this Court's convenience, copies of the topical indices and related materials from petitioner's Opening and Reply Briefs and Petition for Rehearing are annexed hereto as Appendices AA, BB, and CC respectively.)

Respondent denies that petitioner's contention as presently framed would raise a substantial federal question (see Section II, *supra* and Section IV, *infra*), but even assuming solely for purposes of argument that it does, such contention is made belatedly and review by this Court is therefore foreclosed. Stern & Gressman observe with respect to this issue:

> "The jurisdictional requirement relative to the raising of a substantial federal question is formalized in the various subsections of §1257. . . . For purposes of certiorari under subsection (3), the validity of . . . a [federal] treaty or statute must have been 'drawn in question' or a federal

title, right, privilege, or immunity must have been 'specially set up or claimed.' These phrases, 'drawn in question' and 'specially set up or claimed,' are substantially identical in nature, both of them referring to the raising of a substantial federal question in the correct manner. And the proper method of raising the federal question is dependent upon the particular state practice, at least as long as the litigant thereby has a reasonable opportunity to have such an issue heard and determined. *See Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-5; *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-3; *Parker v. Illinois*, 333 U.S. 571, 574-5; *Michel v. Louisiana*, 350 U.S. 91, 93."

Stern & Gressman, Supreme Court Practice, *supra*, § 3.25 at 116.

Under California law, a reviewing court is not required to make an independent review of the record in search of error. If no argument is furnished on a particular point, the court may treat it as waived and pass it without consideration. *See, e.g., Coronet Credit Corp. v. West Thrift Co.* (1966), 244 Cal.App.2d 631, 642, 53 Cal.Rptr. 433, 441; 6 Witkin, *California Procedure* (2d ed. 1971), Appeal § 425 at 4391. Nor will the court of appeal ordinarily grant rehearing on a point first argued in the petition for rehearing. *Smith v. Crocker First National Bank* (1957), 152 Cal. App.2d 832, 837, 314 P.2d 237; *see also* 6 Witkin, *California Procedure, supra*, Appeal § 598 at 4526.

Moreover, petitioner's oblique references in the court of appeal to "due process" and to denial of "a fair trial . . . under our . . . Federal Constitution" are

insufficient to draw into question the constitutionality of the trial court's instruction under federal law:

> "[W]hile there is no precise method for raising a federal question, there are certain requirements of particularity which must be met however the question is raised. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 'the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.'
>
> Thus care must be taken to make reference to the particular clause of the federal Constitution or the particular treaty or statute relied upon, as well as the rights claimed thereunder. The Supreme Court in the past has held insufficient a mere reference to the 'Constitution of the United States,' or the 'Constitution and laws of the United States,' or 'due process of law.' "
>
> Stern & Gressman, Supreme Court Practice, *supra*, § 3.26 at 117 (footnotes omitted).

Nor is it clear from the equivocal reference to "due process" in the petition for rehearing whether the federal or state constitution is invoked. Petitioner's vague reference could be interpreted to mean that Article VI, Section 10 is repugnant to California's due process clause (Cal. Const. Art. I, § 13). Stern and Gressman state that:

> " '[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution

was relied upon, and that such provision must be set forth. *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273. Hence if the claim is made that a state statute is 'unconstitutional' or that it denies 'constitutional rights,' it will be assumed that reference is being made to the state constitution and rights thereunder rather than to the federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-8. If the state constitution has a due process clause, a claim that 'due process' has been violated will be deemed to relate to that clause. *Bowe v. Scott*, 233 U.S. 658, 664-5."

Stern & Gressman, Supreme Court Practice, *supra*, § 3.26 at 118-119.

Petitioner has first unequivocally asserted the presence of any federal question in the petition filed in this Court. Therefore, no jurisdiction for review by this Court has been created. *Moore v. Illinois* (1972), 408 U.S. 786, *reh. denied*, 409 U.S. 897; *Puget Sound Power & Light Co. v. King County* (1924), 264 U.S. 22.

IV

The Due Process Clause of the Fourteenth Amendment Does Not Require State Civil Jury Trials, and A Fortiori It Cannot Be Unconstitutional Thereunder to Limit a State Civil Jury's Function as Petitioner Here Suggests Was Done.

Petitioner contends that he was denied due process by the giving of the challenged instruction and the "usurpation" thereby of the jury's role. Due process, as defined by the fourteenth amendment, does not, however, vest in petitioner any right to trial by jury

whatsoever. That provision only expresses the states' obligation to ensure the right to jury trial in certain criminal proceedings—those which, were they tried in a federal court, would come within the sixth amendment jury trial guarantee. *E.g., McKeiver v. Pennsylvania* (1971), 403 U.S. 528 (no right to jury trial in adjudicative stage of state juvenile proceeding). Denial by a state court of the right to a jury trial in a civil case such as this is therefore no denial of due process under the fourteenth amendment.

A fortiori, the mere limiting of the jury's role in a state civil proceeding, as petitioner here contends was the effect of the court's instruction by "withdrawing" certain issues from consideration by the jury, can hardly be unconstitutional. Such effect, if true, is akin to a directed verdict as to such limited aspects of the case. *Cf.* Federal Rules of Civil Procedure, Rule 50: *Panotex Pipe Line Co. v. Phillips Petroleum Co.* (5th Cir.), 457 F.2d 1279, *cert. denied* (1972), 409 U.S. 845.

Conclusion.

It hardly need be said how narrow is the issue of which petitioner seeks review herein. It is simply not sufficiently important to warrant this Court's attention. It is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated June 3, 1975.

Respectfully submitted,

RICHARD CHERNICK,
Attorney for Respondent.

JOHN H. SHARER,
GIBSON, DUNN & CRUTCHER,
Of Counsel.

APPENDIX AA.

Topical Index and Index to Appendices, Appellant's [Petitioner's] Opening Brief, California Court of Appeal, Second Appellate District.

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

GARY BROTT, a Minor by his Guardian *ad Litem*, DORA BROTT,

Plaintiff and Appellant,

vs.

ST. FRANCIS HOSPITAL OF LYNWOOD,

Defendant and Respondent.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY
HON. HARRY L. HUPP, JUDGE.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

	Page
I	
Chronology of Events	1
II	
Proceedings in the Court Below	3
III	
This Proceeding	3
IV	
The Parties	3
V	
Nature of the Action	4
VI	
The Issues Involved at the Trial	4
VII	
Synopsis	4
VIII	
The Issues Involved in This Appeal. Why the Judgment Should Be Reversed	7
IX	
Statement of Facts	9
X	
The Findings Recorded in the Unsigned and Untimed Entry Beneath the 3:30 P.M. Entry Would Indicate That an Examination Had Perhaps Been Made About 45 Minutes Before the 4:45 P.M. Examination	16

XI Page

Nurse Samuelson Refused to Deny That Her Unsigned and Untimed Entry and Her Unsigned 4:45 P.M. Entry Represented Her Findings of Two Separate Examinations Made at Two Different Times 16

XII

Plaintiff's Counsel Protested and Objected Vigorously and Emphatically and in Advance to the Court Instructing the Jury on the Court's Adaptation to BAJI 15.21 19

XIII

The Court Committed Prejudicial Error in Instructing the Jury on Its Adaptation to BAJI 15.21 20

A. The Court Had No Authority in Law to Give the Instruction to the Jury 23

B. Both the Giving of the Instruction at a Point Halfway Through His Charge and Its Text Caused It to Appear That What the Court Said in That Instruction Was Just as Much the Law of the Case as Were Its Other Instructions. Thus the Instruction Was Indeed Particularly Effective and Prejudicial 24

C. The Trial Court Has Been Forbidden Since the Enactment of Evidence Code Section 600, to Instruct the Jury That a Witness Is Presumed to Speak the Truth, Let Alone to Instruct the Jury That All of the Witnesses, Except the Plaintiff's Parents Did in Fact Tell the Truth 24

D. The Adaptation Was Obviously, of Course, Much More Than a Mere Comment on the Evidence. Even Mere Comment, Although Authorized by the Constitution, Is Rarely

Page

Made in Civil Actions by the Judges in This State 25

E. The Instruction Quite Obviously Was a Powerful Rebuttal to Plaintiff's Counsel's Principal Argument, Although Not Intended That Way, the Instruction Was Actually an Attack Upon Plaintiff's Counsel and Upon His Honesty, Integrity and Sincerity 25

F. The Instruction Was a Vigorous Approval and Endorsement of Defense Counsel and His Avowed Claims to His Honesty That He Had Proclaimed in His Argument to the Jury 25

F1. By Instructing the Jury That He Was Not Convinced the Court Could Very Well Have Led the Jury to Believe That They Also Had to Be Convinced on All the Issues 25

F2. The Court Very Definitely Was Incorrect in What It Stated in Instruction 15.21 25

G. Immediately After Gary Was Born, the Defendant Began the Concealment of the Identity of Nurse Samuelson and the Hour at Which She Had Checked Mrs. Brott's FHTs.. 26

H. Nurse Samuelson Had Been Employed Uninterruptedly for 18 Years Up to the Time She Took the Witness Stand. Additionally, Her Participation Was Recorded Not Only in the Nurses Work Schedule of the 3 to 11 Shift for December 10, 1958, but Also in the Hospital's Birth Record of the Plaintiff. Both Records Have Always Been on File in Defendant's Office 26

iv.

Page

I. Beginning in March, 1972, Nurse Samuelson Had Repeatedly Acknowledged Her Participation in the Care of Mrs. Brott to Nurse Wells and Nurse Merrill 26

J. The Inference Is Almost Inescapable That Defense Counsel Participated in Such Concealment of the Participation of Nurse Samuelson Beginning 9/28/71 Until He Chose to Elicit It From Her at the Sixth Day of Trial 27

K. A Few Specific Instances in Which Defense Counsel Himself Improperly Influenced the Testimony of Witnesses 27

L. A Few Specific Instances in Which Defendant and Its Counsel Gave Untruthful Answers to Interrogatories, Concealed Evidence, and Otherwise Deceived and Misled Plaintiff's Counsel 31

M. Nurse Spalding Repudiated Her Signed Statement and Testified Falsely After Two Separate Conferences With Defense Counsel 35

N. It Is Quite Clear That Much of Nurse Samuelson's Testimony Was Deliberately False 36

O. The Testimony of the Expert Witnesses Differed Much More Than Merely "Somewhat". Actually, Their Differences Could Be Termed Violent. It Is an Utter Impossibility That They All Could Have Been Telling the Truth. Under the Circumstances the Great Likelihood Is That the Jury Concluded That

v.

Page

What the Court Meant When It Instructed Them on Its Adaptation Was That All the Witnesses Who Supported the Defense Had Told the Truth 37

XIV

For Many Weeks Before the Trial Started, Defense Counsel Warned Plaintiff's Counsel That He Had a Secret Weapon Which He Would Use at the Trial. His Secret Weapon Was Nurse Samuelson and Her Suspect and Harmful Testimony 40

XV

It Would Have Served No Purpose to Strike Nurse Samuelson's Testimony. The Harm That Nurse Samuelson's Testimony Did to Plaintiff's Case Was Irreparable. For That Reason Alone, the Willfully False Answers Hereinbefore Described Warrants This Court in Granting Plaintiff a New Trial 42

XVI

The Court Erred in Refusing to Order Dr. Menkes to Produce His Second Report (a Copy of Which Defense Counsel Had Promised to Give to Plaintiff's Counsel) From Which He Had Refreshed His Recollection Before Taking the Stand 42

XVII

The Court Erred in Striking All the Evidence That Two Records Review Committees of the Defendant Had Reviewed Mrs. Brott's and Gary's Chart Shortly After Gary Was Born 43

XVIII Page

Defense Counsel Was Guilty of Misconduct in Arguing to the Jury That the Real Culpable Persons Were Hillecke and Conover and That the Fact That They Paid Plaintiff $85,000 in Settlement Proved It 44

XIX

Defense Counsel Argued to the Jury That He Would Never Improperly Influence the Testimony of Witnesses; That He Was a Very Honest Man and Had Prepared and Defended This Case Accordingly 46

XX

The Jury Never Reached the Issue of the Statute of Limitations. Even if It Had, the Tentacles of the Court's Adaptation of 15.21 Reached Into All the Issues and Tainted the Entire Record. There Was No Evidence That the Action Was Barred by the Statute 47

Summary and Conclusion 48

vii.

INDEX TO APPENDICES

Page

A. Plaintiff's Counsel's Objection to and Protest Against Giving the Adaptation of BAJI 15.21 .... App. p. 1

(a) Authorities Disapproving Such an Instruction 1

B. BAJI Adaptation to 15.21, Introduction to .. 4

C. Presumption Witness Speaks the Truth Now Forbidden BAJI 2.23 5

D. Concealment of Nurse Samuelson's Identity, Evidence Relating Thereto 6

(a) Nurse Merrill's Testimony Regarding Her Three Separate Discussions of Mrs. Brott's Chart With Nurse Samuelson 6

(b) Nurse Samuelson's Conflicting Testimony .. 13

(c) Answers to Interrogatories Concealing Nurse Samuelson's Identity 17

D1. Nurse Samuelson Refused to Deny That Her Unsigned and Untimed Entry and Her Unsigned 4:45 P.M. Entry Represented Her Findings of Two Separate Examinations Made at Two Different Times 22

E. Concealment of Nurse Merrill's Identity, Evidence Relating Thereto 23

F. Nurse Merrill Found Nurse Samuelson's Name on Gary's Birth Record 24

G. Defense Counsel's Opening Statement to Jury (Excerpt) That Neither He nor the Hospital Knew the Identity of Nurse Samuelson 25

H. Defense Counsel's Secret Weapon 25

Page

I. Defense Counsel's Argument to the Jury Re: Settlements of Conover and Hillecke. Such Argument Warrants New Trial: Shepherd v. Walley, 28 CA 3d 1079, 105 Cal. Rptr. 387 26

J. Checking Fetal Heart Tones Testimony of:
(a) Drake—1 to 2 hrs 28
(b) Conover—Every 15 Minutes 30

K. Spalding Signed Statement 30
Spalding's Testimony 31

L. Care of Breech Patient:
(a) Petersen—No Difference for Second Baby.. 35
(b) Drake—More Carefully 35

M. When Dora Should Have Gone to Hospital:
(a) Dora—Go Home and Wait Further Developments 36
(b) Hillecke—Told Her to Go to Hospital Immediately 36

N. Time Necessary for Dilation of Cervix From 3-4 CM to Full Dilation:
(a) Samuelson—Less Than 5 Minutes 37
(b) Brinkman—45 Minutes 37

O. FHTs Slow Down Gradually Before Stopping.. 37

P. Prolapse of Cord 38
Fish—99.9% Occur After Complete Dilation 38

Q. Times Required for a Cesarean Section:
(a) Scott—10-20 Minutes 40
(b) Petersen—1-1½ Hours 40

R. Cause of Retardation:
(a) Fish—Congenital 41
(b) Menkes—Congenital 44

ix.

Page

(c) Gabriel—Hypoxia 45
(d) D'Orazio—Hypoxia 47
(e) Conflicting Testimony Regarding Presence of Simian Creases 48
S. Proceedings Re Menkes' Secret Second Report.. 49
T. Chart Completion:
(a) Scott—No Rule Against Completion 51
(b) Samuelson—Rule Can't Complete After Patient Leaves Obstetrical Department 51
Interrogatory Propounded May 10, 1972; St. Francis Ans. Filed 6/13/72; Rule: re Chart Completion 52
U. Statute of Limitations
(a) Section 29 C.C. Applicable Statute of Limitations 53
(b) Myers v. Stevenson (Statute Begins to Run From Discovery) 53
(c) Jury Never Reached Issue Whether Action Was Barred by Statute 54
(1) Juror Myers' Declaration Filed by Plaintiff (12/8/72) 54
(2) Juror Myers' Declaration Filed by Defendant (12/18/72) 55
(3) Petero's Declaration Filed by Plaintiff (12/8/72) 56
(d) Dora Brott—October 17, 1967, Discovery Date 57
(e) Fred Brott—October 17, 1967, Discovery Date 58
(f) Hilleeke—Told Mrs. Brott Gary's Condition Was an Act of God. The Brotts Always Believed That to Be True 60

x.

Page

V. Two Feet Protruding Not Consistent With 3-4 cm Dilation 60

W. Meaning of Question "?" Mark on Labor Record Re "Position":

(a) Samuelson—Means Unable to Determine Position 61

(b) Freeman—Not Appropriate Mark if Foot Is Visible 61

X. The Identities of the Parties and Witnesses and Their Relationships 62

Y. Defense Counsel's Argument to the Jury That He Was Extremely Honest, Etc. 65

Z. Whether Fetal Heart Tones Were Always Recorded:

(a) Kennedy—Normal FHTs Are Not Always Recorded 66

(b) Spalding—Normal FHTs Are Always Recorded 66

AA. Records Review Committees;

(a) Knight—Brotts' Charts Were Reviewed by Records Review Committees 67

(b) Conover—Doctors' Entries Reviewed and Request Completion of Charts; the Two Brott Charts Reviewed 68

(c) Scott—Sends Incomplete Charts to the Doctor for Completion; in Complicated Situations Nurses' Notes Reviewed by Committee 69

BB. Thoren v. Johnston & Washer, 29 CA 3rd 270, December 1972 72

CC. Labor Room Record

DD. Nurses' Summary

APPENDIX BB.

Topical Index, Appellant's [Petitioner's] Reply Brief, California Court of Appeal, Second Appellate District.

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

GARY BROTT, a Minor by his Guardian *ad Litem*, DORA BROTT,

Plaintiff-Appellant,

vs.

ST. FRANCIS HOSPITAL OF LYNWOOD,

Defendant-Respondent.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY.
HON. HARRY L. HUPP, JUDGE.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

ARGUMENT

Page

The Statute of Limitations Does Not Bar the Instant Action 1

The Court Committed Prejudicial Error in Instructing the Jury on Its Adaptation to BAJI 15.21 12

The Trial Court's Instruction and Adaptation to BAJI 15.21 Constituted Prejudicial Error Because It Deprived Appellant From Arguing the Legitimate Force and Effect of the Willful Failure to Make Discovery and the Suppression of Material Evidence 16

Conclusion 25

APPENDIX CC.

Topical Index and Index to Appendices, Appellant's [Petitioner's] Petition for Rehearing, California Court of Appeal, Second Appellate District.

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

GARY BROTT, a Minor by his Guardian *ad Litem*, DORA BROTT,

Plaintiff and Appellant,

vs.

ST. FRANCIS HOSPITAL OF LYNWOOD,

Defendant and Respondent.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY.
HON. HARRY L. HUPP, JUDGE.

APPELLANT'S PETITION FOR REHEARING.

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TOPICAL INDEX

Page

Issues to Be Discussed 1

Did Not the Court Commit Prejudicial Error in Giving Its Adaptation to BAJI 15.21 and Was Not the Plaintiff Prejudiced by the Concealment of Nurse Samuelson's Identity? 1

Proceedings in Chambers Before the Giving of BAJI 15.21 2

Plaintiff's Counsel Objected Vigorously, Emphatically and in Advance to the Giving of the Instruction 2

BAJI 15.21—Including the Judge's Opening and Closing Comments 3

Facts and Testimony Which the Opinion Overlooks, Fails to Mention or Fails to Make Clear 6

The Trial Judge's Right to Comment on the Evidence, of Course, Was Not Unlimited 10

The Trial Judge's Adaptation of BAJI 15.21 Was Prejudicially Erroneous in at Least Fifteen (15) Separate and Distinct Respects 11

Statements Before and Following the Challenged Instruction That Jurors Were the Sole Judges of the Credibility of Witnesses and the Weight of Evidence Did Not Cure the Partisan Statements Which Were Prejudicial and Necessarily Resulted in a Denial of Due Process 14

INDEX TO APPENDICES

Appendix A. Testimony That Supports Plaintiff's Position ..... App. p. 1

Appendix B. Authorities Which Support Plaintiff's Position 3